Filed 10/31/01

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

ARDEN CARMICHAEL, INC. et al., Plaintiffs and Appellants, v. COUNTY OF SACRAMENTO, Defendant and Respondent.	C031367 (Super.Ct.No. 97AS05460)

APPEAL from the judgment of Sacramento County Superior Court, John R. Lewis, Judge. Reversed and remanded.

Hoseit & Koelewyn, H. L. Koelewyn, Ishikawa Law Office, Brendon Ishikawa, for Appellants.

Robert A. Ryan, Jr., Sacramento County Counsel, and Elaine P. DiPietro, Deputy County Counsel, for Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of subparts C, D, and E of Part II.

In *Arden Carmichael, Inc.* v. *County of Sacramento* (*Arden Carmichael)*,[1] this Court held that a fee imposed on nonprofit organizations by the County of Sacramento (the County) based upon a percentage of their gross receipts earned from bingo games violated article XIII, section 26, subdivision (d) of the state Constitution (hereinafter sometimes referred to as subdivision (d)). Subdivision (d) provides that a nonprofit organization "is exempt from any business license tax or fee measured by income or gross receipts that is levied by a county . . . ."

In an effort to conform with the law, the County changed its fee structure. It now imposes a fee based upon a percentage of the prize payouts from the bingo games.

Plaintiffs, a group of 34 nonprofit organizations that operate licensed bingo games within the County, brought this action challenging the County's new fee structure, arguing that "[p]rize payouts . . . track the gross income closely enough to be considered inextricably linked" and that a fee based thereon is therefore violative of the state Constitution's prohibition against fees measured by income or gross receipts. Plaintiffs also argue that the new fee violates Penal Code section 326.5, subdivision (*l*)(2), which authorizes the imposition of a license fee in the amount of $50, plus an additional fee that may not

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[1] *Arden Carmichael, Inc.* v. County *of Sacramento* (2000) 79 Cal.App.4th 1070.

exceed the actual costs of law enforcement and public safety directly related to the bingo activities.

The County moved for summary adjudication, and the trial court ruled that the County's new fee complied with the state Constitution and Penal Code section 326.5.

In the published portion of our opinion, we conclude that the County's fee does not violate the state Constitution because a fee measured by prize payouts -- which is an expense of the bingo operations -- cannot be deemed a fee based on income or gross receipts. Neither the plain language of the constitutional provision nor its purpose supports an extension of the prohibition to fees based on expenses. However, we reverse and remand because the County has failed to sustain its burden of persuasion that there is no triable issue of material fact whether the County is charging plaintiffs a fee that exceeds that permitted by Penal Code section 326.5, subdivision (*l*)(2).

I. BACKGROUND

In June 1994, the voters adopted Proposition 176, which amended and limited the reach of article XIII, section 26 of the state Constitution -- which authorizes, with some exceptions, the imposition of taxes measured by income -- by adding another exception, subdivision (d). Subdivision (d), which exempts nonprofit organizations from any local business license tax or fee measured by income or gross receipts, states in relevant part: "A nonprofit organization that is exempted from taxation

by Chapter 4 . . . of Part 11 of Division 2 of the Revenue and Taxation Code or Subchapter F . . . of Chapter 1 of Subtitle A of the Internal Revenue Code of 1986 . . . is exempt from any business license tax or fee measured by income or gross receipts that is levied by a county or city, whether charter or general law, a city and county, a school district, a special district, or any other local agency."

Notwithstanding the passage of Proposition 176, between June 1994 and December 1996, the County collected from nonprofit organizations $905,134.37 in fees based on one percent of each organization's gross receipts over $5,000 earned from bingo games, as authorized by a former version of Penal Code section 326.5 and a former County ordinance.[2] Given the clear and unambiguous language of subdivision (d), we concluded in *Arden Carmichael* that the County's imposition of a "fee . . . based on the gross receipts of the bingo games was unconstitutional."[3]

Effective January 1, 1997, Penal Code section 326.5 was amended (hereinafter referred to as section 326.5) to conform with the requirements of subdivision (d). Section 326.5, subdivision (*l*), now states in relevant part:

"(*l*)(1) A city, county, or city and county may impose a license fee on each organization that it authorizes to conduct

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[2] *Arden Carmichael, Inc.*, *supra*, 79 Cal.App.4th at pages 1073-1074.

[3] *Arden Carmichael, Inc., supra,* 79 Cal.App.4th at page 1077.

bingo games. The fee, whether for the initial license or renewal, shall not exceed fifty dollars ($50) annually . . . .

"(2) In lieu of the license fee permitted under paragraph (1), a city, county, or city and county may impose a license fee of fifty dollars ($50) paid upon application. . . .
An additional fee for law enforcement and public safety costs incurred by the city, county, or city and county that are directly related to bingo activities may be imposed and shall be collected monthly by the city, county, or city and county issuing the license; however, the fee shall not exceed the actual costs incurred in providing the service." (Stats. 1996, ch. 283, § 1.)

Also effective January 1, 1997, the County amended County Code section 4.26.050 to conform with section 326.5, modifying the basis for its bingo fee from one percent of gross receipts to a $50 fee plus an additional fee, to be prescribed by the County Board of Supervisors, to recover law enforcement and public safety costs in accordance with section 326.5. That fee, as set by the Board of Supervisors, has varied from 1.225 percent of monthly prize payouts (less an exemption of $2,000 monthly) for the period of January-March 1997, to a fee of 1.2 percent for April-December 1997, to a fee of 1.15 percent effective January 1, 1998.

In deciding to base a fee on prize payouts, the County reasoned that not only was the amount of prize payouts steady, thereby offering "a consistent source of monies for the County to fully recover its costs," but that "prize payouts generally

correlate[d] to the amount of time involved by the County in regulating licensees": "Usually, with greater sums in prizes and payouts[,] a charity conducts more games thereby attracting a larger number of gamblers."

In direct response to the County's new fee structure, plaintiffs filed this suit seeking a refund of bingo fees collected by the County from January 1 to May 31, 1997. In their first cause of action, plaintiffs charged that because prize payouts are linked to gross receipts, the County's new fee structure violated the state Constitution. They also contended that the amount of fees did not reflect the actual law enforcement and public safety costs incurred by the County to oversee the operation of the bingo games. A third cause of action was later added making the same claims for an unspecified future time period. (Second and fourth causes of action sought declaratory relief over the right of members of one charitable organization to work in the bingo hall of another, but this is not at issue on appeal.[4])

The County thereafter filed a motion for summary judgment, or in the alternative, for summary adjudication and judgment on the pleadings.

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[4] We deny plaintiffs' motion to strike that portion of the County's brief that addresses those causes of action, however. Rule 18, California Rules of Court, authorizes the court to order a brief stricken, or to disregard its defects, when it fails to comply with the California Rules of Court. But plaintiffs never specify in their motion which rule the County's brief violated by reason of its discussion of those causes of action.

Following hearing and argument, the trial court granted the County's motion for summary adjudication. The court concluded that the fee complied with the state Constitution and section 326.5. The court also granted the County's motion for judgment on the pleadings with respect to the second and fourth causes of action for declaratory relief. The action was dismissed in its entirety. Plaintiffs appeal.

II. DISCUSSION

A. *Standard of Review*

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law."[5]

"[G]enerally, the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact."[6] "[I]f the court concludes that the [opposing party's] evidence or inferences raise a triable issue of material

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[5] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, footnote omitted.

[6] *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at page 850.

fact, it must conclude its consideration and deny the . . . motion."[7]

B. *The Constitutionality of the Fee*

Plaintiffs' claim that the County's fee violates the state Constitution presents only a legal question. It is undisputed that the County's fee is calculated on the basis of prize payouts, and the relevant question is whether this violates subdivision (d)'s prohibition against fees "measured by income or gross receipts."[8] This issue was thus properly subject to a summary judgment determination.

Plaintiffs argue that a fee measured by prize payouts is illegal because "[p]rize payouts . . . track the gross income closely enough to be considered inextricably linked." They observe that "prize payouts have historically amounted to about 77 percent of gross receipts," and thus claim that the County adjusted its fee from one percent of *gross receipts* under the former (and now unconstitutional) County ordinance to roughly 1.298 percent of *prize payouts* under the new County code section to achieve the same result.[9] Plaintiffs argue that the County cannot do indirectly what it is prohibited from doing directly.

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[7] *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at page 856.

[8] California Constitution, article XIII, section 26, subdivision (d).

[9] Plaintiffs request that we take judicial notice of the simple mathematical calculation that supports this analysis. We grant
(Continued)

Plaintiffs are correct that prize payouts do appear to be a roughly constant percentage of gross receipts, ranging from 77.7 percent of gross receipts in fiscal year 1992-1993, to 77.8 percent in fiscal year 1993-1994, to 77.1 percent in fiscal year 1994-1995.

But this analysis misses its target. The issue in this case is not whether the County is legally permitted to devise a new measure for its fee that recovers the same amount of revenue as before, but whether the particular measure developed by the County is constitutional. We have little doubt that as long as the County is legally entitled to recover all of its law enforcement and public safety costs -- and it is -- it will eventually find a constitutional formula to collect them. Thus, the question becomes whether the state Constitution prohibits a fee calculated as a percentage of prize payouts, simply because prize payouts can be shown to be a roughly constant percentage of gross receipts -- a measure that the Constitution prohibits.

"We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] In the case of a constitutional provision adopted by the voters, their intent governs. [Citations.] To determine intent, '"The court turns first to the words themselves for the answer."' [Citations.] 'If the language is clear and unambiguous there is no need for

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the request. (Evid. Code, §§ 452, subd. (h), 459, subds. (a) & (c); see *People v. Bradley* (1982) 132 Cal.App.3d 737, 743, fn. 6.)

construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters).' [Citation.]"[10]

In this case, article XIII, section 26 generally permits "[t]axes on or measured by income,"[11] but makes specific exceptions, including that specified under subdivision (d). Subdivision (d) provides that "[a] nonprofit organization that is exempted from [federal or state income] taxation . . . is exempt from any business license tax or fee measured by income or gross receipts that is levied by a county or city, whether charter or general law, a city and county, a school district, a special district, or any other local agency."[12] Accordingly, the provision does not exempt nonprofit organizations from all business license taxes or fees, but only those measured by income or gross receipts.

Prize payouts are, however, not income but an expense to the nonprofit organization. They are ultimately deducted from the gross income realized by the nonprofit organization to determine the net income that it has derived from its bingo games. Does a fee based on an expense that is *deducted from* gross receipts

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[10] *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.

[11] California Constitution, article XIII, section 26, subdivision (a).

[12] California Constitution, article XIII, section 26, subdivision (d).

constitute a prohibited fee *measured by* income or gross receipts under subdivision (d)? We think not.

First, we not only look to the words of a provision to ascertain its intent,[13] but acknowledge that the words "generally provide the most reliable indicator of [the lawmakers'] intent."[14] In this case, the plain language of subdivision (d) does not prohibit fees that are measured on the basis of expenses, although it certainly could have. "A constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words."[15] Adherence to the natural and ordinary meaning of "income" and "gross receipts" in subdivision (d) supports the conclusion that the County's fee, measured instead by a type of expense, does not violate the constitutional provision. "The constitution is to be interpreted by the language in which it is written, and courts are no more at liberty to add provisions to what is therein declared in definite language than they are to disregard any of its express provisions."[16] A court that *speculates* over what a provision might have said, rather than grounding its interpretation on what the provision has in fact said, oversteps its judicial role.

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[13] *Delaney v. Superior Court, supra,* 50 Cal.3d at page 798.

[14] *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871.

[15] *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.

[16] *People v. Campbell* (1902) 138 Cal. 11, 15, quoted favorably in *Delaney v. Superior Court, supra,* 50 Cal.3d at page 799.

Our state high court's decision in *A.B.C. Distributing Co. v. City and County of San Francisco*[17] supports our conclusion that a fee based on an expense incurred by a taxpayer does not constitute a fee measured by income or gross receipts. There, the plaintiffs -- wholesale liquor and beer distributors -- contended that San Francisco's ordinance, which imposed a one percent payroll expense tax on persons hiring employees to perform services in San Francisco, violated, among other things, section 17041.5 of the Revenue and Taxation Code, which provides that no city may levy or collect any tax upon the income of any person. Although the payroll expense tax was measured by the wages paid to employees, the California Supreme Court rejected the challenge: "The short answer to plaintiffs' contention is that the payroll expense tax is not a tax on or measured by *their* income. Instead, the tax is imposed upon plaintiffs by reason of their employment of labor within the city and county, measured by the expense incurred by plaintiffs in conducting this aspect of their business. The fact that the tax is measured by wages paid to the employees would not convert the tax to an income tax."[18] Thus, the state Supreme Court distinguished a tax measured by an expense incurred by plaintiffs from one measured by their income. In response to plaintiffs' suggestion that a payroll expense tax was, in essence, an income tax because it was paid from

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[17] *A.B.C. Distributing Co. v. City and County of San Francisco* (1975) 15 Cal.3d 566.

[18] *A.B.C. Distributing Co. v. City and County of San Francisco, supra,* 15 Cal.3d at page 576, original italics.

plaintiffs' income -- a suggestion similar to that of plaintiffs in this case -- the state high court observed that "all taxes necessarily involve some reduction of and relationship to available revenues."[19]

Our construction is also supported by the canon of statutory construction, expressio unius est exclusio alterius. This maxim "expresses the learning of common experience that when people say one thing they do not mean something else."[20] Here, subdivision (d)'s specific listing of prohibited measures for taxation -- income or gross receipts -- permits the others. "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose."[21]

Nor can a fee based on prize payouts be deemed a mere subterfuge to circumvent subdivision (d)'s prohibition on the use of income or gross receipts as a measure for fees. We suppose that plaintiffs could argue that subdivision (d)'s exemption should be construed to extend beyond income-based fees on the ground that it also includes a ban against fees based on gross receipts, thereby also prohibiting income-*like* measurements.

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[19] *A.B.C. Distributing Co. v. City and County of San Francisco, supra,* 15 Cal.3d at page 576.

[20] 2A Singer, Statutes and Statutory Construction (6th ed. 2000) Intrinsic Aids, section 47.24, pages 319-320.

[21] 2A Singer, Statutes and Statutory Construction, *supra,* Literal Interpretation, section 46.06, page 192.

However, to the extent that the reference to gross receipts is argued to create an ambiguity, "it is appropriate to consider indicia of the voters' intent" in construing the provision[22] -- which was an initiative measure, Proposition 176. This includes the analysis and arguments contained in the official ballot pamphlet.[23] The argument in favor of Proposition 176 in the ballot pamphlet stated that it would "protect community service groups from having their *contributions* taxed which were originally intended to aid many of the community health and human services such as those for children, the disabled, the poor or those displaced by natural disasters."[24] Proponents further argued that "[n]onprofit organizations *should be exempt from any business license tax or fee measured by income or gross receipts* because they would need to reduce services, raise fees, or divert staff and volunteer time to raising more funds to pay these taxes."[25]

These ballot arguments demonstrate two points. First, the exemption from fees measured by income or gross receipts was intended to protect contributions and other categories of revenue from direct taxation, which would directly reduce those revenues and the services they fund. Taxing an *expense*, however, has the

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[22] *Legislature v. Eu* (1991) 54 Cal.3d 492, 504.

[23] *Legislature v. Eu, supra,* 54 Cal.3d at page 504.

[24] Ballot Pamphlet, Primary Election (June 1994) Argument in Favor of Proposition 176, page 12; italics added.

[25] Ballot Pamphlet, *supra,* Rebuttal to Argument Against Proposition 176, page 13, italics in original.

opposite effect: It encourages a reduction in expenses, with an accompanying benefit to revenues. Second, nothing expressly stated in the ballot arguments supports a reading of subdivision (d) that is different from its plain language. Neither the subdivision's plain language nor the interpretive materials suggest an intent to prohibit all fees or any fees other than those based on a measurement that is expressly prohibited. To go beyond the express words of this constitutional provision, when no express intent to do so appears in either the text or interpretative materials, would trespass into the province of policy, which is the prerogative of the lawmaker, not the judge.

Finally, by limiting our construction of subdivision (d) to its plain language, we promote predictability in the law, which is of particular value in laws affecting economic activity: Where a provision, as here, is meant to guide the future behavior of governments and the public alike in making tax and economic decisions, respectively, reliance on the provision's plain language allows interested parties to gear their actions to the law's objective text, rather than wager their future on an uncertain quest in the courts for the law's inner meaning. We conclude that the County was entitled to rely on subdivision (d)'s text in determining to base its fee on an expense of the bingo operations -- prize payouts -- in lieu of one of the income-based measurements prohibited by that provision.

C. *Section 326.5*

As noted earlier, section 326.5, subdivision (*l*)(2), allows a county to impose a "fee for law enforcement and public safety costs incurred by the . . . county . . . that are directly related to bingo activities . . . ; however, the fee shall not exceed the actual costs incurred in providing the service."

Plaintiffs contend that the County's fee violates the parameters of section 326.5, subdivision (*l*)(2), because "the County did not limit the fees that it recovered from the Sacramento charities either to those directly linked to law enforcement and public safety or to those actually incurred."

The County responds that "[i]n each instance when the fee was set, the estimated annual revenues closely approximated estimated annual costs: (1) 1.225 [percent] fee (January 1997 through March 1997), estimated cost of $449,000, estimated revenue of $400,000; (2) 1.2 [percent] fee (April 1997 through December 1997), estimated cost of $391,729, estimated revenue of $392,125.34; (3) 1.15 [percent] fee (January 1998 to present), estimated cost of $388,766 adjusted down to $369,612 (adjusted down in order to adjust the fee for actual cost), estimated revenue of $375,102.47. Thus, in this case the undisputed facts lead to but one conclusion, that the fee is reasonable as required by law[] because, the estimated revenue to be collected does not unreasonably exceed the estimated cost, and the fee is subsequently adjusted to reflect actual cost as required by the Penal Code." (Italics omitted.)

This defense is insufficient to bear the weight of plaintiffs' argument. The statutory standard is not whether the *estimated* revenues do not unreasonably exceed the *estimated* cost, but whether the actual revenue derived from the fee does not "exceed the actual costs incurred in providing the service."[26]

In fact, the County's own evidence in support of its summary adjudication motion raises a triable issue of material fact over whether its fee exceeds the County's actual costs. As admitted by the County in its statement of undisputed material facts, its fee, based on a percentage of prize payouts, was calculated on the basis of the *estimated* costs for a specified period. As a result, for the period starting January 1, 1998, the fees were adjusted downwards to "reflect[] an excess amount of fees above actual cost recovered during the prior fee period of January 1 to June 30, 1997." This suggests that the fee collected from January 1 to June 30, 1997 exceeded "the actual costs incurred in providing the service" in violation of section 326.5, subdivision (l)(2). Even if we assume that a refund of the overcharge would place the County in compliance with the statute, adjusting the fee for a *future* period is not equivalent to complying with the statutory requirement that the fee not exceed the actual costs during the prior period. That is because no evidence was presented that the following year's adjustment actually refunded the amount of the overpayment to the relevant plaintiffs. For instance, there was no evidence that the bingo prize payouts for

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[26] Section 326.5, subdivision (l)(2).

each of the 24 plaintiff organizations in 1997 (upon which their fees were calculated) were in the same proportions in 1998, such that a reduced fee in 1998 would properly compensate each organization for the excess fee charged in 1997.

In that connection, we note that section 326.5 allows a county to impose a license fee "on each organization that it authorizes to conduct bingo games"[27] and requires any additional fee imposed for law enforcement purposes to be collected "monthly," provided the fee does "not exceed the actual costs incurred in providing the service."[28] This suggests that while the monthly fee may be reasonably allocated among the licensed organizations, the statute does not allow the fee to be allocated among different time periods. An excessive fee charged to one organization in one time period is not refunded by reducing the fees assessed on another organization in another time period.

There is also a triable issue of material fact here whether each and every cost that the fee recovered for law enforcement and public safety purposes was "directly related to bingo activities,"[29] as required by the statute. The County's evidence in support of its motion for summary adjudication is replete with examples of recovered costs that the County labeled as "indirect." The estimated costs for the Sacramento County

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[27] Section 326.5, subdivision (*l*)(1).

[28] Section 326.5, subdivision (*l*)(2).

[29] Section 326.5, subdivision (*l*)(2).

Sheriff's Department Bingo Unit, for instance, show indirect costs of $98,995 for January-March 1997. According to the materials identified by the County for us following oral argument, these indirect costs were based on an "Indirect Cost Rate Proposal," which, in turn, showed indirect costs relating to "undistributed costs," supplies, "admin," records, word processing, and training/reserve, among others. Admittedly, a mere label of "indirect" does not mean that such costs were not directly related to the bingo activities. But without definitive evidence of how these expenditures constitute *law enforcement* and *public safety* costs directly related to bingo activities, it is impossible to conclude *as a matter of law* that these costs fall within the parameters of section 326.5, subdivision (*l*)(2). As our Supreme Court recently stated in *Aguilar v. Atlantic Richfield Co.*, "from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law."[30] We cannot say that the County has carried its burden of persuasion that it is entitled to judgment as a matter of law on this point.

Here, the County merely introduced evidence that "[i]ndirect [c]osts," apportioned among different general categories, were included in its fee calculation, without explaining the relationship between those costs and the County's law enforcement

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[30] *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at page 850.

services for the bingo operations. It thus did not carry its burden of persuasion that there was no triable issue of material fact over whether these costs were directly related to the bingo activities. As the state high court in *Aguilar v. Atlantic Richfield Co.* explained: "[I]f a defendant moves for summary judgment against . . . a plaintiff, he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not -- otherwise, *he* would not be entitled to judgment *as a matter of law,* but would have to present *his* evidence to a trier of fact."[31] In this case, the evidence was simply insufficient to *require a* reasonable trier of fact not to find relevant material facts in favor of plaintiffs. We are instead asked to assume that these *indirect* costs for law enforcement and public safety services are *directly* related to the plaintiffs' bingo operations. This we cannot do on summary judgment.

The County argues that for purposes of section 326.5, subdivision (*l*)(2), the costs of law enforcement and public safety "include[] all costs, to wit: direct and indirect costs (and 'pro rata costs'") and that the statute is only concerned that "costs for bingo activity . . . be included in the fee . . . ."

But under section 326.5, subdivision (*l*)(2), the law enforcement and public safety costs must be "directly related" to

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[31] *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at page 851, original italics, footnote omitted.

the bingo activities, not merely related in some fashion. "Whenever possible a construction must be adopted which will give effect to all provisions of the statute."[32] We therefore cannot ignore the phrase "directly related." Indeed, prior versions of the bill that amended section 326.5, subdivision (*l*)(2), into its present form, had provided for the recovery of "direct and indirect service costs,"[33] but the reference to indirect costs was subsequently deleted.[34] Accordingly, the County's general reference to "indirect costs," which have been allocated to various expense categories, for undescribed services, fails to satisfy its burden of persuasion that its fees only seek recovery of those law enforcement and public safety costs that are directly related to the bingo activities.

Similarly, the County's evidence that its fee covers the costs incurred for undescribed assistance by the Office of County Counsel is insufficient to satisfy its "burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law."[35] The County argues that "when County Counsel provides legal services to the Sheriff and coincidentally to the Board of Supervisors on the regulation

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[32] *Parris v. Zolin* (1996) 12 Cal.4th 839, 845.

[33] Assembly Amendment to Assembly Bill Number 2770 (1995-1996 Reg. Sess.) March 28, 1996.

[34] See Assembly Amendment to Assembly Bill Number 2770 (1995-1996 Reg. Sess.) May 20, 1996.

[35] *Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at page 850.

of bingo, such legal services are indeed 'law enforcement and public safety costs' as provided in [section 326.5, s]ubdivision (*l*)(2)." We agree that to the extent that the County Counsel's assistance related to law enforcement and public safety matters directly related to the bingo operations, the County could properly seek to recoup such costs. But on this record, it simply cannot be determined exactly what services were provided by County Counsel.

The County spends much of its brief reiterating the well-established principle that the validity of an ordinance is presumed, and that all doubts are to be resolved in favor of upholding the ordinance.[36] But this principle of construction cannot override the clear language of section 326.5, which limits the County's right to recoup its costs to law enforcement and public safety costs directly related to the bingo operations.

Accordingly, the trial court erred in concluding that as a matter of law, the County's fee complied with section 326.5. This issue must be remanded for further proceedings. We, of course, express no opinion as to the outcome of those proceedings and further note that the County is entitled under the law to fully recover its actual law enforcement and public safety costs directly related to the bingo activities.

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[36] E.g., *City and County of San Francisco* v. *Cooper* (1975) 13 Cal.3d 898, 915-916 and footnote 7; *County of Sacramento* v. *City of Sacramento* (1946) 75 Cal.App.2d 436, 449.

D. *The Right to Pay Counsel*

Plaintiffs contend that the County has "denied them the right to pay for their own counsel out of bingo funds." Not only was this issue not raised in the plaintiffs' pleadings, but we have already decided this issue favorably to plaintiffs in *Arden Carmichael,*[37] and will not revisit it.

E. *Attorney Fees*

Plaintiffs request an award of attorney fees pursuant to the private attorney general doctrine under Code of Civil Procedure section 1021.5 because "a favorable decision of this Court . . . will inure to the benefit of many California nonprofit organizations and charities."

The request is premature. Plaintiffs lost their claim that the County's fee violates the California Constitution. Plaintiffs' claim that the fee violates section 326.5, subdivision (*l*)(2), must still be resolved pursuant to further proceedings in the trial court. If the plaintiffs believe that they qualify for an award following trial, they may move for such an award at that time in the trial court.

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[37] *Arden Carmichael, Inc., supra,* 79 Cal.App.4th at pages 1077-1079.

DISPOSITION

The judgment is reversed, and the matter is remanded to the trial court with directions to enter an order denying the County's motion for summary adjudication with respect to the first and third causes of action and to conduct proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

KOLKEY, J.

We concur:

MORRISON, Acting P.J.

HULL, J.